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IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1973

No. 73-448

JAROLD WILLIAM SLACK,
a/k/a BILLY J. BUDSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAL R. HORTON
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Anchorage, Alaska 99501

Counsel for Petitioner

Washington, D.C. • CLB PUBLISHERS, INC. •

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JAROLD WILLIAM SLACK,
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PETITION FOR WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT

The Petitioner, JAROLD WILLIAM SLACK a/k/a Billy J. Budson, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit rendered in these proceedings on July 2, 1973.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in the above entitled case is attached hereto as Appendix A and reported at 470 F.2d 24 (1973 9th Cir.). The District Court opinion is attached as Appendix B.

JURISDICTION

The order or judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 2, 1973. See Appendix A. This Petition for Certiorari was filed less than thirty (30) days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

Will probable cause existing in the mind of one F.B.I. agent support an arrest by a fellow agent having no information as to probable cause, and having no warrant.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On June 16, 1971, the Parkway Branch of the First National Bank of Anchorage was robbed. Two men with

masks and guns took $9,330.00. It is undisputed that neither of the two men was Jarold William Slack.

On June 25, 1971, several F.B.I. Agents were on duty at the Seattle-Tacoma airport. They had arrest warrants for the co-defendants, Richard Carl Snyder and Charles Eugene Shaw, but not for Jarold William Slack. Agent Murphy had secured a Xerox photograph of an individual known to him as either a Mr. Slack or a Mr. Budson. He immediately determined that an individual paging a "Mr. Shaw" was in fact the man in the photograph.

Agent Murphy summoned Agent Reap to take over the surveillance of defendant Slack. Sometime thereafter Agent Reap performed the actual arrest without orders from Agent Murphy and without a warrant. There is no indication that the arresting officer, Reap, had probable cause or was acting on orders of Murphy.

Jarold William Slack, Charles Eugene Shaw and Richard Carl Snyder were jointly indicted on the 7th day of July, 1971 and jointly tried in the United States District Court for the District of Alaska. Jarold William Slack was convicted under an Amended Indictment of the crimes of armed robbery, conspiracy to commit robbery and two counts of felon in possession of firearms.

Judgment was entered on the 25th day of August, 1972, sentencing defendant Slack as follows: Imprisonment for twelve years and a fine of $2,500.00 for aiding and abetting in the crime of bank robbery; five years for conspiracy to commit bank robbery, and two years each on two separate counts of possession of firearms by a convicted felon. The sentences to run concurrent.

At trial, defendant Slack objected to the admissibility of evidence seized in a search pursuant to his arrest. Defendant Slack argued that no warrant had been issued nor had probable cause been shown for the arrest. The

trial court, holding that probable cause did exist, admitted into evidence three handguns, two of which were similar to those used in the robbery. *The arresting officer did not take the stand.*

Defendant Slack noticed his appeal to the United States Court of Appeals for the Ninth Circuit on the 25th day of August, 1972. His conviction was affirmed on July 2, 1973.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction in the Court of first instance is founded in 18 U.S.C. Sec. 2113.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW DECIDES A FEDERAL QUESTION OF SUBSTANCE NOT IN ACCORD WITH THE PROTECTIONS GUARANTEED BY THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND NOT PREVIOUSLY DECIDED BY THIS COURT.

It is clear that F.B.I. Agents may make arrests without warrant for any offense against the United States committed in their presence or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed, or is committing such felony. 18 U.S.C. Sec. 3052. The reasonable grounds requirement of §3052 is equivalent to the "probable cause" requirement of the Fourth Amendment. *Henry v. United States,* 361 U.S. 98 (1959).

Probable cause exists where the facts and circumstances within the knowledge of the arresting officers, of which they had reasonably trustworthy information,

were sufficient to warrant a man of reasonable caution in believing that an offense has been, or is being, committed and that the person arrested was or is the offender, *Carroll v. United States,* 267 U.S. 132 (1925), *Henry v. United States, supra.*

Defendant Slack respectfully submits that no probable cause was demonstrated by the arresting officer for his arrest.

Agent Murphy testified that he was on duty for the Federal Bureau of Investigation at the Seattle-Tacoma airport on June 25, 1971. He had warrants for Richard Carl Snyder and Charles Shaw. Agent Murphy and Agent Stark heard a page for Mr. Shaw to go to Gate C-9 and learned that a Mr. Budson had made the page. Agent Murphy had in his possession a Xerox photograph of an individual known to him as a Mr. Slack or Mr. Budson, and determined that the man placing the page was in fact the man in the photograph.

Agent Murphy summoned Agent Reap to take over the surveillance while Agent Murphy left the scene. Sometime thereafter Agent Reap performed the actual arrest without a warrant on a charge of conspiracy to commit bank robbery.

Agent Reap, the arresting officer, was not called by the Government as a witness. The testimony in this case fails to establish any indication that the arresting officer, Agent Reap, or any of his superiors had sufficient information upon which to base a belief that the defendant Slack had committed a crime.

The trial court, after hearing argument by counsel for the Government, not under oath and not subject to cross-examination, held that probable cause did exist and admitted plaintiff's Exhibits Seven, Eight, Eighteen, and Thirty-Four. Objection had been properly made to the admission of these exhibits based on the lack of probable cause and lack of warrant.

Objection was also made by the attorney for Shaw that the evidence seized from the search of Mr. Slack incidental to the illegal arrest revealed plane tickets and ticket stubs which provided the F.B.I. with the information needed to obtain a search warrant for the luggage, and, therefore, that the luggage and the articles found therein should be excluded as fruit of the poisonous tree under the principles of *Wong Sun.*

It is the function of this court to determine whether the facts available *to Officer Reap* at the moment of arrest would "warrant a man of reasonable caution in the belief" that an offense has been committed, *Carroll v. United States,* 267 U.S. 132, 162; *Beck v. Ohio,* 379 U.S. 89, 98. There is no testimony available to guide the court as Reap did not take the stand.

In *Beck,* the defendant had been arrested after a stop by police officers. The officers had a picture of the defendant and had reports that he was involved in illegal gambling activities. Gambling receipts were found in his sock in a search pursuant to the arrest.

The Supreme Court of the United States held that it had the duty to examine the record for facts to support the arrest, and quoted *Ker v. California,* 374 U.S. 23:

> While this court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings and the record so that it can determine for itself whether in the decision as to the reasonableness the fundamental–i.e., constitutional –criteria established by this court have been respected.

The court in *Beck* then reversed the conviction as it could not find sufficient facts in the record to support the arrest. It summarily eliminated the argument that

good faith of the arresting officer is sufficient to support the arrest (See also: *Henry v. United States,* 361 U.S. 98 at 102), and generally condemned warrantless arrests:

> An arrest without a warrant bypasses the safeguards provided by an objective, predetermination of probable cause and substitutes instead the far less reliable procedure of an after the event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. (Citing *Wong Sun v. United States,* 371 U.S. 471).

The thrust of the government's position with respect to the illegal arrest seems to be that a ruling of probable cause may properly be based upon representation of an assistant United States Attorney. This is true, apparently because he is an officer of the court who is at all times under a general oath with respect to his conduct in court.

This position seems to be inconsistent with the law as stated by the trial judge in the instant case in Jury Instruction 55.

In that instruction the court stated:

> Statements and arguments of counsel are not evidence in the case unless made as an admission or stipulation of fact.

This instruction seems to be well established in American jurisprudence, notwithstanding the argument of the Assistant United States Attorney to the contrary. In addition, the United States acknowledges that the record does not show exactly how much of the information was in the possession of Special Agent Reap at the time he made the arrest of defendant Slack. This alone should be sufficient to cause this court to find that probable cause was not properly established.

The government, apparently conceding that the arresting officer did not have sufficient information to constitute probable cause, falls back on the case of *United States v. Ragsdale*, 470 F.2d 24 (5th Cir., November 10, 1972, 12 Criminal Law Reporter 2218).

In *Ragsdale*, two patrol officers stopped a motorist for excessive speed and erratic driving. One of the officers removed the driver from the automobile and observed a partially concealed weapon. This officer did not communicate his observation to his comrade.

With no information as to the partially concealed weapon, the second officer conducted a search of the automobile and found several guns. The court held that the first officer would have been under a duty to search the car before allowing the motorist to return to it, and therefore the search by his comrade, even though otherwise illegal, would be upheld.

The facts in the instant case are obviously distinguishable. There is no showing that Agent Murphy was present and constituted part of a team of which Agent Reap was a member.

Agent Murphy testified that he paged Agent Reap in the airport. He further testified that he informed Agent Reap that Mr. Budson was under observation. It is respectfully submitted that the record fails to show even a scintilla of information possessed by Agent Reap which would justify an arrest.

It is also significant that Agent Reap was not called to testify at the trial. This court may well infer that the failure of the United States to call as a witness a person available to them justifies a presumption that any testimony by that witness would be unfavorable. And, it should be noted that reliance on weaker and less satisfactory evidence when better evidence appears to be available justifies the inference that the evidence not

produced would be unfavorable. This presumption should certainly obtain when the witness is a Federal Bureau of Investigation Agent and no suitable explanation is contained in the record for his absence.

CONCLUSION

As evidence of the probable cause for the arrest of defendant Slack is wholly lacking, in the transcript or the record, the arrest and subsequent search of the defendant were clearly illegal and all evidence arising therefrom should have been suppressed by the trial court.

Respectfully submitted,

HAL R. HORTON
733 West Fourth Avenue
Anchorage, Alaska 99501
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* v. JAROLD WILLIAM SLACK, a/k/a Billy J. Budson, *Appellant.*	)	No. 72-2567
UNITED STATES OF AMERICA, *Appellee,* v. CHARLES EUGENE SHAW, a/k/a Carlos Borando, a/k/a F. Wilson, a/k/a George Harris, Jr., *Appellant.*	)	No. 72-2962
UNITED STATES OF AMERICA, *Appellee,* v. RICHARD CARL SNYDER, a/k/a Richard Yancy, a/k/a Richard Carl Ziegman, a/k/a Rick, *Appellant.*	)	No. 72-2963
	)	MEMORANDUM

[July 2, 1973]

Appeal from the United States District Court
for the District of Alaska

Before: HUFSTEDLER and CHOY, Circuit Judges, and TAYLOR,* District Judge

Slack's Appeal

Slack contends that the district court erred (1) in denying his severance motion, (2) in denying his suppression motion, and (3) in admitting inculpatory statements that he made to Officer Gray.

He argues that the district court abused its discretion in refusing to sever his trial from that of his codefendants, because the evidence against Snyder and Shaw was "overwhelming" and the evidence against him was, by comparison, slight. Although Slack was not physically present at the bank and none of the proceeds of the robbery were traced to him, abundant circumstantial evidence linked him to his codefendants and to the robbery. Moreover, Slack had made highly inculpatory statements about his connection with the robbery. He suffered discomfiture, not legal prejudice, from the joint trial; his discomfort was no greater than that inherent in conspiracy trials. Denial of his severance motion was not error.

The search was legal if there was probable cause to arrest him. Probable cause has to be determined as of the time the arrest was made and not by the revelations of hindsight. Murphy and Reap were working as a team, although the two men were not always acting side by side. Did the officers have enough information between

*Hon. Fred M. Taylor, Senior Judge, District of Idaho, sitting by designation.

[1] This case is unlike King v. United States (9th Cir. 1970) 426 F.2d 278, because in *King* the court did not take judicial notice. The limited remand in *King* would serve no purpose here.

them to justify the arrest? We think that they did. Murphy had identified Slack from a photograph as a robbery suspect. He knew that Slack was traveling as "Budson" with Shaw and Yancy (Snyder) for whom he had arrest warrants. Reap observed Slack with Shaw and Yancy, heard Slack paged, and observed Slack's nervousness. Any one of these circumstances would not have been enough to amount to probable cause, but together they were sufficient to justify the arrest. (*Cf. United States v. Ragsdale* (5th Cir. 1972) 438 F.2d 21.)

There was no error in admitting Slack's incriminating statements. He was not in custody. Ample evidence supported the determination that his statements were voluntary. (*E.g., United States v. Tucker* (9th Cir. 1970) 435 F.2d 1017; *see Schneckloth v. Bustamonte* (1973) ..... U.S. ....., ... [slip opinion pp. 5-8].)

Shaw's Appeal

Shaw claims three errors: (1) improper judicial notice of the federally insured status of the First National Bank of Anchorage; (2) denial of his motion to suppress, and (3) unfair pretrial and trial identifications.

From the facts that the word "National" appears in the bank's name, as every national bank is required to state (5 U.S.C. §22), that national banks must be federally insured (12 U.S.C. §1814(b)), that the court sitting in Anchorage could have decided that the national character of the bank was more likely than not to have been generally known in the community, and that the status of the bank was "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy," we conclude that the court did not err in judicially noticing the bank's status. (*See United States v. Phillips* (9th Cir. 1970) 427 F.2d

1035, 1037; *cf. Byers v. United States* (10th Cir. 1949) 175 F.2d 654, 656.)[1] Our upholding judicial notice in this case is not an indication of general approval of judicial notice of a bank's status. Community knowledge in Anchorage cannot be equated with general knowledge in Los Angeles. The judicial notice doctrine must be carefully scrutinized when it is used in a criminal case and resort to the doctrine must be narrowly circumscribed.

The district court was entitled to find from the evidence that Shaw abandoned the property that he had left in the room. His landlady's activities in moving his remaining belongings and in transmitting the green slip of paper cannot be equated with police action. The subsequent warrantless search and seizure were legal. (*E.g., Parmon v. United States* (D.C. Cir. 1968) 399 F.2d 559.)

We do not think that the photographic display was impermissibly suggestive or that the in-court identifications were tainted. Although the photographs did not depict persons who were carbon copies of one another, there was no gross disparity between Shaw's features as thus shown and those of the others. (*United States v. Faulkner* (9th Cir. 1971) 447 F.2d 869; *United States v. Williams* (9th Cir. 1970) 436 F.2d 1166.)

Snyder's Appeal

Snyder's contention that judicial notice was improperly invoked has been heretofore rejected. He further claims that the court erred (1) in denying his severance motion, (2) in denying his motion to dismiss Count II, (3) in admitting certain exhibits without limiting instructions, and (4) in denying his motion for acquittal.

His argument for severance closely parallels Slack's. We reject it for the same reasons. The evidence against Snyder on the conspiracy charge was not minimal. He

was tightly woven into the robbery. The jury could have believed the innocent explanations for his possession of the tainted money and his intimate association with his codefendants during the period in question. But it was not obliged to do so, and it is not our task to substitute our judgment of the weight of legitimate inferences for that of the jury.

Under the circumstances of this case, there was no prejudicial error in failing to give limiting instructions. The purchase and possession of weapons were overt acts pursuant to the conspiracy with which Snyder was charged. The only distinctive feature was that the weapons charges against his codefendants referred to them as felons. We do not think that the jury had any difficulty in sorting out the "felon in possession" charge and vicarious possession by Snyder, a nonfelon, of the weapons purchased and used pursuant to conspiracy.

We perceive no error in denying Snyder's motion to dismiss Count II. The form of the indictment may not have displayed the utmost of technical nicety, but Count II adequately informed him of the charges he had to meet. No more is required.

We do not think that Snyder's claim of government suppression of favorable evidence has enough merit to warrant discussion.

From our earlier comments about denial of severance, it is plain that the evidence taken most favorably to the government was sufficient to support the conviction.

The judgments are affirmed.

APPENDIX B

JUDGMENT AND COMMITMENT (Rev. 2-63) Cr. Form No. 25

FILED

United States District Court

FOR THE

DISTRICT OF ALASKA

AUG 25 1972

CLERK, U.S. DISTRICT COURT

By ____ Deputy

United States of America

v.

JAROLD WILLIAM SLACK, a/k/a BILLY J. BUDSON

No. A-67-71 CR

On this 25th day of August, 1972 came the attorney for the government and the defendant appeared in person and by counsel Edward J. Reasor.

It Is Adjudged that the defendant upon his plea of not guilty, and a verdict of guilty,
has been convicted of the offense of aiding and abetting the crime of bank robbery, conspiracy, and possession of firearms by convicted felon, in violation of Title 18, U.S.C., Sections 371 and 2113(a) & (d), and Title 18 Appendix, U.S.C., Section 1202(a)(1),

in Counts I, II, III, and IV as charged of the amended indictment,
and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of twelve (12) years on Count I, five (5) years on Count II, two (2) years on Count III, two (2) years on Count IV, and fined the sum of $2,500.00 on Count I. Said sentence of imprisonment on Counts II, III, and IV to run concurrently, not consecutively, with sentence of imprisonment on Count I.

The defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law.

/s/ James A. Von der Heydt

United States District Judge

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

DATED: August 25, 1972.

/s/ James A. Von der Heydt

United States District Judge

The Court hereby commits the defendant to

J. P. HEUSSER, Clerk

BY: /s/ Jeannie Wiegers

Deputy Clerk

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-448

JAROLD WILLIAM SLACK A/K/A
BILLY J. BUDSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that there was insufficient probable cause for his arrest without a warrant.

After a jury trial in the United States District Court for the District of Alaska, petitioner was convicted on four counts of aiding and abetting a bank robbery, conspiracy, and possession of a firearm by a convicted felon, in violation of 18 U.S.C. 371 and 2113(a) and (d), and 18 U.S.C. App. 1202(a)(1). He was sentenced to concurrent terms of twelve years on Count I, five years on Count II, and two years each on Counts III and IV; he was also fined $2,500 on Count I. The court of appeals affirmed (Pet. App. A).

At about 5:00 p.m. on June 16, 1971, a bank in Anchorage, Alaska was robbed by two disguised men (petitioner's co-defendants, Shaw and Snyder) carrying guns and a

plastic bag (Tr. 193-194). The two men were seen abandoning the getaway car in the area of a new housing project (Tr. 536-537, 542, 609). Earlier that afternoon, Shaw had been seen in the area of the same housing project driving a green Checker station wagon, which belonged to petitioner (Tr. 516-518, 1015). Petitioner spent most of the afternoon with his son and daughter, and for a period of time in the late afternoon he parked in a new subdivision where houses were being built, and where the two children played for quite some time (Tr. 312-313, 636-637). Petitioner had a minor automobile accident at 5:22 p.m., at a place within 16 minutes' drive of the subdivision where Shaw and Snyder abandoned the getaway car (Tr. 633, 642, 1864).

Disguises identical to those worn by the bank robbers were purchased around noon on the day of the robbery by a boy and a girl whose appearance was similar to that of petitioner's children and who were believed to be petitioner's children (Tr. 457, 462, 485, 491). Guns similar to those used in the robbery were purchased by petitioner at two gun shops (Tr. 1010-1020, 1171, 1178-1180, 1307-1309).

Petitioner, Shaw and Snyder were known to be close associates during the period before and after the bank robbery (Tr. 1360, 1015). A few days after the bank robbery, the three men traveled together under assumed names by automobile from Anchorage to Valdez, Alaska, by ferry from Valdez to Cordova, Alaska, and by Alaska Airlines from Cordova to Seattle, Washington (Tr. 1062, 1071, 1137-1140, 1084, 1092-1093, 1126). Before leaving Anchorage, Shaw had made statements to an associate about having "pull[ed] a federal job," and "going outside to make a hit" (Tr. 1349, 1355). Petitioner had

told this same person about his automobile accident, which occurred shortly after the robbery, and its investigation by a police officer. In doing so he said, "There I stand with [masks and] everything in my trunk, talking to a policeman" (Tr. 1352-1354).[1]

On the basis of information received from the Anchorage F.B.I. office, F.B.I. agents were waiting to apprehend petitioner, Shaw, and Snyder at the Seattle-Tacoma International Airport on the night of June 25, 1971 (Tr. 1203-1204). They had arrest warrants for Shaw and Snyder and a picture of petitioner (Tr. 1203, 1206). They heard someone paging Shaw and proceeded to the gate where the page was being made. A man by the name of Budson was pointed out to them as the person who had made the page and, after comparing the man to petitioner's picture, the agents determined that it was petitioner (Tr. 1206). They watched petitioner for about five minutes, during which time he appeared jittery, walking in and out of a lounge and looking around (Tr. 1206-1207). Agent Reap, who was not then watching petitioner, was called to the scene, advised of the observation of petitioner, and instructed to take over the observation. Shortly thereafter, petitioner was arrested by Agent Reap (Tr. 1208). A search of petitioner pursuant to the arrest produced an airline ticket stub for petitioner, Shaw and Yancy (Snyder), and their baggage claim tickets (Tr. 1212, 1222). The baggage claim tickets were used to obtain a search warrant for their luggage, which had been sent on to Pasco, Washington. Numerous items, including three loaded handguns and a large

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[1] The majority of the foregoing facts, although not specifically shown to be within the knowledge of the agents who arrested petitioner, were known to the Anchorage F.B.I. office prior to petitioner's arrest (Tr. 456-457, 523, 538, 605, 611, 1075, 1358).

supply of ammunition for each, were found in the luggage (Tr. 1249-1285).

Toward the end of the presentation of the government's case, petitioner objected to the admission of the contents of the luggage on the ground that the arrest had been illegal. The prosecutor contended that the objection was untimely, but made an offer of proof that the arresting F.B.I. agents had information from the Anchorage F.B.I. office that Slack had been involved in a bank robbery. The trial court denied the objection without holding an evidentiary hearing on the issue, ruling that there was "abundant ground" to determine that probable cause existed (Tr. 1297).

1. The objection to the admission of the evidence was not timely. At the time of the trial, Rule 41(e) of the Federal Rules of Criminal Procedure provided that a motion to suppress evidence because of an unlawful search "shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."[2] It would thus not have been error for the trial court to deny the objection on this ground. *United States* v. *Dykes,* 460 F. 2d 324 (C.A. 9); *United States* v. *Dittus,* 453 F. 2d 1335 (C.A. 3). Instead, the trial court in its discretion heard the objection but did not order an evidentiary hearing. In this context, the court was entitled to accept the offer of proof by the prosecutor that the agents had been informed

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[2] This section has been revised, effective Oct. 1, 1972. Under the proposed revision to Rule 12, to which the former Rule 41 provisions for suppression motions are to be transferred in modified form, such motions must be made before trial or they will be waived.

by the Anchorage office of the F.B.I. that it had probable cause to believe that Slack had participated in a bank robbery.

Counsel for the petitioner also failed to object to the arrest at the time the baggage claim checks were themselves admitted into evidence (Tr. 1214-1222). This occurred during the testimony of Agent Murphy, who actually conducted the search of petitioner.[3] Because of the untimeliness of the objection, the trial court was entitled to accept the assurances of the prosecutor that the agents were informed that the Anchorage office of the F.B.I. had information constituting probable cause for arrest.

2. The record, including the facts recited above, shows that probable cause for arrest did exist. Because the trial judge did not order an evidentiary hearing on the issue of probable cause for the arrest, the evidence relating to this issue in the record is evidence which was introduced in the course of the trial on the issue of guilt. The ruling of the trial judge, without requiring a separate hearing, that there was "abundant ground" for a finding of probable cause reflects his conclusion on the basis of the substantial evidence before him.

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[3] The impact of the untimeliness of this type of objection in a trial such as this is revealed by information provided to us by A. Lee Peterson, the Assistant United States Attorney who tried the case. He reports that Special Agent Reap, who actually made the arrest, was brought to Anchorage to be available for testimony at the time of trial should the need arise. When the issue of the legality of arrest was not raised at the time the items taken from Slack's person were admitted into evidence, Reap was allowed to return to his duties in Seattle. The issue was then raised the following day, but Agent Reap was not at that time available for testimony in Anchorage.

This was also the conclusion of the court of appeals (Pet. 2a-3a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

DOJ-1973-11